COLUMBIA LAW REVIEW.

Vol. XIII. APRIL, 1913. No. 4

PROCEDURE IN THE FEUDAL CURIA REGIS.

The question of procedure in the great central court during the feudal period is one which has its bearing upon the history of the constitution as well as upon legal history. Its importance in the latter respect does not need to be pointed out, but the introduction of the new prerogative forms of procedure in the twelfth century marks in itself a great constitutional as well as legal epoch, and the fact that these forms were never adopted by the great curia regis is of importance in understanding peculiarities of the present day constitution. A recent writer on the history of the law has also called attention to the importance of the early procedural rules of Parliament, and through them to the large debt which Parliament owed to its close alliance with the law.[1]

At first glance it would seem as if the exact information to be found in the sources is too slight to justify any detailed account of procedure in the feudal curia regis, and that is probably why none has yet been attempted. It is possible, however, that a comparison of sources may enable us to reach some conclusions which will have at least the value of a working hypothesis.

We are fortunate in having as a starting point a detailed account of an important trial for treason by the full curia regis at the beginning of the reign of William Rufus. It is manifestly the account of an eye witness, and we are told by one of the highest authorities upon the character of the historical material of this period that there is no ground on which to question its authenticity.[2] It certainly gives abundant internal evidence of its genuineness. The account is lively, sympathetic, and apparently full, and though plainly written by one of the supporters of the ac-

[1] Mr. W. S. Holdsworth in 12 COLUMBIA LAW REVIEW 1, 15-16. See the last part of notes 30 and 41.

[2] Prof. Felix Liebermann. *Aufsätze dem Andenken an Georg Waitz gewidmet.* (1886) 159, n. 10.

cused, it makes a decided impression of trustworthiness in matters of detail.[3] This is the trial of William of Saint-Calais, bishop of Durham, in 1088.[4]

The circumstances leading to the trial need only the briefest statement. They are fully given in several modern histories, notably in Freeman's *William Rufus*.[5] In the great rebellion of the Norman barons in England against William II. at the beginning of his reign, the bishop of Durham after some service to the king suddenly abandoned him, and if he did not join actively in the revolt he at least rendered the king no further service. Even before the rebellion was put down William Rufus, who for some reason seems to have felt more bitter towards the bishop than towards any other of the revolting barons, had begun proceedings against him, seizing his barony and treating it as virtually confiscated in advance of a formal condemnation,[6] a liberty with the

[3]The *Chronicon Monasterii de Bello (Anglia Christiana Societas)* (1846) 85-104, gives us one other account of a curia regis trial of so detailed a character that it is of peculiar value for comparison and control. This was a case of the early years of Henry II. involving the liberties of the abbey, called in question by the claims of the bishop of Chichester. It was first summoned before the great council at St. Edmunds at Pentecost 1257 but on account of the pressure of business was adjourned to May 24th at Colchester. There it was finally decided by what seems from the names of those present (p. 87), to have been an unusually large small council. See my *Origin of the English Constitution*, p. 197. On the 24th the king with a few whom he personally selected, in the presence of the abbot but not of the bishop, examined the abbot's written evidences and asked some questions, but the actual trial was not held until the 28th. I shall cite it by reference to the pages of the chronicle. To the action of the king in this case in making a preliminary examination of the evidence for one side, there is an interesting parallel in a suit between the abbot of St. Albans and the bishop of Lincoln. *Gesta Abbatum*, I. 150-153. Henry with an earl, a baron, and an archdeacon goes apart to examine the charters submitted by the abbot. The archdeacon of Canterbury comes in while this examination is going on and offers suggestions and the king tells him to go away. In the Battle Abbey case he forbids at the outset anyone to go with him who is not invited. Such a practice does not seem to have been general. It may have been peculiar to Henry II.

[4]*De injusta vexatione Willelmi episcopi primi.* Symeon of Durham. (Rolls Series) I. 170-195; Dugdale, *Monasticon* (1849) I. 244-250. References that follow are made to the Rolls edition of Symeon of Durham.

[5]Freeman, *William Rufus*, I. 28*ff.* and appendix C.

[6]The bishop in his second letter to the king (p. 174) calls this seizure of his lands *sine ratione et judicio* and so it was in strict procedure, but the occupation of the fief of a rebellious vassal in advance of a judicial decision against him was altogether too frequent in the feudal world, except where the vassal was so powerful as to make steps against him partake of the character almost of interstate war, to be regarded as an unwarranted injustice. It is quite possible that it is action of this kind in many cases to which the phrase *sine judicio* refers in the baronial complaints, leading perhaps to c. 39 of Magna Carta. William Rufus seems in this case to have gone a step further in making grants from the bishop's lands as if the fief were already legally in his hands by a formal confiscation.

strict law frequently allowed themselves by the Norman kings, and indeed hardly to be avoided. Some earlier incidents of a procedural character would be of interest in a full history of the case, but the formal trial, with which we are here concerned, began on November 2, 1088, in a meeting of the great council at Salisbury.

In regard to the composition of the assembly by which the bishop was tried, we are given no definite information. Incidentally it appears from the narrative that many great nobles and many bishops were present. The statement on the subject made by the writer, at the point at which the bishop first retired in order that the court might pass judgment on the demands which he had made, is not to be taken very seriously.[7] It is certainly not a technical statement, but doubtless indicates in a general way the classes recognized by an eye witness as present, and seems to have been intended to imply the prejudiced character of the court. Three well marked classes are clearly in the writer's mind as present, bishops, lay nobles, among whom he refers only to those of the rank of count, and officials.[8] Noticeably there are mentioned among the latter, sheriffs, reeves, and huntsmen, but they are not mentioned in such a way as to justify us in inferring the

Whether so extreme a step was common before a judicial sentence or not I cannot say. It was certainly common in the case of escheats and confiscations legally *in manu*, including ecclesiastical fiefs during vacancies, which might be considered *quasi* wardships. Examples of these last are to be found in the *Red Book*, 210, 211. Both these last cases, it will be noticed, indicate the difficulty which ecclesiastical baronies had in getting a practical benefit of the principle of the law that such grants should not be in permanency. Glanvill, VII. 9.

[7] "Egresso itaque episcopo cum suis, et rege cum suis, episcopis, et consulibus, et vicecomitibus, et praepositis, et venatoribus, aliisque quorumlibet officiorum, in judicio remanente." (p. 183.)

[8] The question of the composition of the curia regis is so well settled as not to need discussion, but one can hardly fail to think of the composition of the court in another famous trial of a bishop as given in the anonymous life of Thomas Becket: "rex edicto publico convocavit episcopos et abbates, comites etiam et proceres, et omnes officiales suos, omnesque omnino qui alicujus essent auctoritatis vel nominis, die designato apud Norhamtonam." *Materials*, IV. 41. To this should be added the passage in Fitzstephens' account, *Ibid.* III. 67, concerning the reinforcement made to the court after the bishop had withdrawn: "Evocantur quidam vicecomites et secundae dignitatis barones, antiqui dierum, ut addantur eis et assint judicio." These words appear to indicate a summons in peculiar circumstances of persons not usually attending. It is interesting that in what is, I think, the first case before the curia regis after the Conquest which has been reported to us (1070), the composition of the court is stated in practically the same terms that are used for two hundred years: "in consilio, in loco qui vocatur Pedreda celebrato, coram rege ac Doruberniae archiepiscopo Landfranco, et episcopis, abbatibus, comitibus, et primatibus totius Angliae." Florence of Worcester, II. 8.

presence here of any persons outside the baronial class, though there is very likely a suggestion that some present were not of high rank.[9]

Earlier in the summer, the bishop had twice been formally summoned to answer the charges against him in the king's court, probably by royal writ, *de vestro brevi*, he says in his second letter to the king.[10] There had been no trial, however; in the first session of the court, the bishop refused to be tried as a feudal tenant, and the king refused to accept the purgation which the bishop offered. As purgation was a method of meeting charges constantly employed in the ecclesiastical, as well as in the popular courts, the bishop could offer it without stepping outside the limitations which he was trying to put upon the king's right to try him. The king probably saw clearly enough the futility of such a method of proof in this case, and his refusal to accept it indicates that it was not a part of any regular procedure in the great curia regis which could be demanded as customary, but no reason can be given why it should not be used occasionally.[11] That a written summons was sent the bishop for the meeting of the curia of November 2nd is not stated, but on the day of his arrival at Salisbury he was visited by Urse d'Abetot, who summoned him orally to the presence of the king. In this act Urse could hardly have been acting in any

[9]Lanfranc's opinion, expressed on page 191, that the court could not try the bishop on a new charge because he no longer held anything of the king, though resting upon ground which would certainly not be recognized as sound by the later prerogative courts, shows clearly enough that he regarded the court as distinctly feudal and that the principle of the composition of the feudal curia regis was in mind. It is a rather important statement. The bishop as being no longer a vassal of the king could not be held to answer a charge in that particular court. See n. 45.

[10]Symeon of Durham, I. 174.

[11]Or it may be merely that the king refused to accept the bishop's oath except by a judgment of his court since the award of the oath, in theory at least, implied a presumption of innocence. In a case before the great council in 1176, Bigelow, *Placita*, 223, from John of Brompton in Twysden, *Scriptores*, 1109, between the archbishop of York and the bishop of Ely, the latter was allowed to purge himself. Wager of his law by the bishop of Carlisle was ordered by the council and the bishops, Bracton, N. B., pl. 741. If purgation were excluded the ordeal would be also in the twelfth century, and Roger of Wendover records that under William I. at a date not specified Remigius of Fécamp, who was made bishop of Lincoln, was purged of treason by a famulus of his who went to the ordeal for him. (ed. Coxe) II. 24; M. Paris (ed. Luard) II. 20. There was nothing in the ordinary feudal law which would lead it to exclude purgation. On the contrary it made use of it constantly. See *Usatici Barchinone Patrie*, c. 168 (In Giraud, *Droit Francais*, II. 501); *Libri Feudorum* I. 4, and *cf.* the *Compilatio Antiqua*, I. 7, in Lehmann, *Lehnrecht*, 89. In the *Libri Feudorum*, *defensio* constantly means the oath. [Not so given in Du Cange, but see *Libri Feud.* II. 58 (57).] The distinction between *probatio* and *defensio* is frequently made in the *Libri Feudorum*.

regular official capacity, certainly not as sheriff.[12] His authority was probably a special delegation for the occasion, made to him merely in his capacity as a peer of the court.

This method of summons, through the authority of the court or of the king, was the regular method for the curia regis in all its forms after the Conquest. The original Teutonic method of private summons, served by the complainant or plaintiff himself, which had survived the Saxon age in the popular courts of the hundred and shire, seems never to have been employed in the Norman king's courts.[13] This is sufficiently accounted for by the fact that this method of summons had never been employed even in early times by the Frankish royal courts, and that indeed by the tenth century the official summons of the royal courts, the *bannitio,* had driven the private summons, the *mannitio,* out of use in the popular courts of the Empire.[14] Naturally, therefore, the Norman practice would not include it. On the other hand what may be perhaps described as the normal feudal summons, the summons of a peer of the court by one of his fellow peers, or by two peers, seems not to have been exclusively employed in the Anglo-Norman king's court, but this method and the writ were probably both in use with little distinction in rule or practice between them.[15]

[12]Urse d'Abetot was sheriff of Worcestershire.

[13]See Bigelow, *Procedure,* Chap. VI.

[14]Brunner, *Schwurgerichte,* 60-63; *Deutsche Rechtsgeschichte,* (1906) I. 410; Luchaire, *Institutions Monarchiques,* (1891) I. 325-327; Glasson, *Droit de la France,* VI. 477*ff*.

[15]The question of the method of summons employed in royal and private feudal courts is one of a good deal of difficulty, and probably the only safe conclusion at present is that there was always much variety and no particular method prescribed and necessary. Still I think that the evidence points to the fact that summons by peers, or a peer, of the court was, before the thirteenth century, the more normal and expected method. This seems to be the meaning of the first issue raised in the pleadings of the Countess of Flanders in the famous appeal of default of right brought against her in the court of the king of France in 1224. See Langlois, *Textes relatifs a l'Histoire du Parlement,* No. XXI; Boutaric, *Actes du Parlement,* I. *cccliii,* c. 2; Martène, *Ampl. Coll.* I. 1193. The court decides that summons by two knights is sufficient, a decision which rests manifestly upon a different body of evidence from that on which another issue raised in this case is decided, *viz.,* that the officials in the court ought not to be considered as peers of the barons. See *Origin of the English Constitution,* 270. The decision as to summons is less consistently supported by the evidence and is to be regarded, I think, as a judicial settlement in the interests of the royal courts, just beginning to assert their authority, of a point not definitely settled by the earlier customary law. Parallel to this case is that of the abbot of St. Michael who pleads, some time after the French occupation of Normandy, that summons to the host by a sergeant is not sufficient in the case of a baron of the king, but the court decides against him. Brussel, *Usage des Fiefs,* I. 173. Cases of summons by peers, or a peer, of the court may be found as follows: Langlois, *Textes,*

As the narrative goes on to the trial as a whole, one cannot fail to be struck with the informality, the conversational freedom of a large part of the proceedings. There were plainly what seem to be strict rules which were followed when it came to the point of the actual transaction of business, but formal decisions were prepared for by what seems like the impromtu give and take of a debating and deliberating assembly.[16]

Before the formal opening of the court, but in the presence

No. XIX; Brussel, *Usage*, I. 337. Beaumanoir (ed. Salmon) I. 43, c. 58, states the principle, and in c. 68, p. 48 the exception in favor of the count who may claim sovereign, or semi-sovereign powers. The principle, in the analogous case of summons to perform feudal services is still more fully stated in the *Assizes de Jerusalem, Livre de Jean d'Ibelin*, c. 218 (ed. Beugnot) I. 348. Whatever may be thought of the capacity in which Urse d'Abetot is acting in summoning the bishop of Durham at Salisbury, there can be no doubt about the summons by peers of the court served upon him after the trial was over to appear before the court in London at Christmas time, Symeon of Durham, 193. When Henry III. is preparing to have Hubert de Burgh outlawed, and is taking some pains with the legality of his procedure, he orders him to be summoned by "duos barones regis qui de rege tenent in capite." *Close Rolls*, 1232, 161. In a privilege of the Emperor Frederick II. for the bishop of Cremona, dated 1159, it was provided that if the vassals summoned *"a paribus curiae tuae"* did not appear within forty days they should lose their fiefs, Ficker, *Forschungen*, III. 324.

[16]This appears very clearly in the detailed account of the case in the *Chron. Mon. de Bello*, 87-104. The king is constantly speaking. He interrupts the bishop's statement of his case three times; Henry of Essex also interrupts three times, Richard de Luci once, and the chancellor speaks to the bishop once. The bishop in turn interrupts the chancellor's speech. The last part of the case is particularly conversational: "Multis igitur super his hinc indeque habitis, tandem silentio inposito Ricardus de Luci surgens regem voce supplici exoravit," and later (p. 97). Free discussion with some disorder is also graphically described in the account of Anselm's trial, particularly in the effort to formulate a judgment against the archbishop. Eadmer, 58.

The clearly informal character of general discussion which is so evident in these proceedings may very possibly be another evidence of the failure to make any clear distinction between legislative and judicial action. The curia regis was primarily a deliberative body and, while certain things must be done according to formal rules, especially when the final decision of the curia was expressed on any point, its method of reaching such a decision, of finding out the matured opinion of a majority, was that of informal and free discussion. Instances of discussion in political sessions may be found in Matthew Paris, III. 380-384; IV. 185-188; 362-368; V. 423-425, 520, 530. In this last case besides the political business, Robert de Ros was on trial.

Accounts of trials in the great curia regis from the reign of Henry II. are of particular interest because the question inevitably arises whether the new prerogative procedure which was then so rapidly developing, especially in the itinerant justice courts, and in the central court corresponding to them, affected methods of trial in the old central curia regis. That this was not the case is I think clearly shown in the cases cited in these notes. Especially interesting is the trial described in the *Chron. Mon. de Bello*, 106-109, for it began with a writ of right, a part of the prerogative procedure, and was afterwards transferred for the actual trial to the curia regis.

of the assembly, the bishop had requested to be allowed to take counsel with the other bishops who were present, and this had been refused him.[17] Apparently also before the formal opening[18] he had stated to archbishop Lanfranc that the proceedings must be canonically conducted, and suggested that he appear in his official vestments before the other bishops similarly vested, thus foreshadowing his chief line of defense during the whole trial. Lanfranc evidently saw the point and declared that they would be able to judge between him and the king vested as they were.

On the opening of the court, bishop William did not wait for a formal accusation but took matters into his own hands at once. He rose in his place[19] and demanded that his bishopric which had been taken away from him *sine judicio* should be returned to him. Lanfranc answered, *rege tacente*, as if the writer at least expected the answer to be made by the king. Lanfranc denied that his bishopric had ever been taken from him, and the bishop then stated at length how he had been disseised of his "whole bishopric which he had in the county of York," and the lands of the church given away by the king to his own barons as he pleased.[20] Lanfranc again saw the drift of the attempt which the accused was making to dodge the real issue and reminded him that he was there to do justice to the king; afterwards he might make his own complaints. "Do you say this as counsel or as a judgment," quickly demanded William. Lanfranc was not to be tricked into saying that he gave counsel. "Certainly," he said, "I do not say it as a judgment, but if the king would take my advice he would quickly cause it to be

[17]See below n. 37.

[18]In the suit between the abbot of St. Albans and the bishop of Lincoln, *Gesta Abb.* I. 150-153, the abbot raises a point before the formal opening which apparently the king decides himself, perhaps because he thinks the royal dignity or sovereignty involved.

[19]This *surgens*, which is noted in many cases both before private and royal courts, denotes a certain degree at least of formality. In the bishop of Bath's court the *testes surgentes* and *stantes in medio* give their evidence. Madox, *Exchequer* I. 111, n. 1; in the bishop of Durham's court, H. de Percy *exurgens* speaks, Symeon of Durham, II. 262; in the curia regis, Richard de Luci states the case of the abbot of Battle, *surgens et in medio stans, Chron. Mon. de Bello* (p. 88), then *co residente abbas surrexit* and went on with his case (p. 89), and afterwards the bishop *surgens* argued against it (p. 90).

[20]"Rogerum Paganellum, quem hic video, qui ex praecepto regis me dissaisivit de toto episcopatu meo quem habeo in Eboracensi comitatu." (p. 179). This carefully framed answer indicates that bishop William had clearly in mind the difficulty created by his feudal relationship to the king, by the barony which he held, and was deliberately trying to dodge it. See notes 35 and 40.

made into a judgment."[21] Then the barons *animati* by these words *exclamantes dixerunt* that the bishop must first do justice to the king.[22] This was equivalent to a judgment of the court but it seems to have been very informally reached and with some confusion for the narrative goes on: "Laicis vero hæc et alia multa declamantibus et iterantibus, facto silentio dixit episcopus."[23] The position which the accused then took, falling back on what is evidently his carefully prepared line of defense, is that he will not have the lay members of the court as his judges but only the king and the bishops.

At this point the king interposed for the first time and said he had hoped that the bishop would answer the accusation which he made and was astonished that he demanded something different. Upon this Alan of Brittany, and Roger Bygod who had pledged

[21]"..sed si rex mihi crediderit, satis cito faciet inde judicium fieri.." a plain enough statement that the king does not make the judgment, notwithstanding his great interest in the case. *Cf.* in the agreement under which the bishop comes to court the promise that the trial shall not be delayed beyond the end of September "nisi per consensum episcopi, vel per tales terminos quales judices legales dictis causis inter regem et episcopum juste poni debere decernerent." (p. 178). Very interesting is the evidence of the trial of Anselm upon this point. The king was bitterly determined to condemn the archbishop and tried to drive the court to make the judgment he desired. He said: "Quid placet, si hæc non placent? Dum vivo parem mihi in regno meo utique sustinere nolo. Et sic sciebatis eum tanto in causa sua robore fultum, quare permisistis me incipere placitum istud contra eum? Ite, consiliamini, quia, per Vultum Dei, si vos illum ad voluntatem meam non damnaveritis, ego damnabo vos." Eadmer, 62. He failed however and was obliged to accept his failure: "Quod ille repressa sustinuit ira, rationi eorum palam ne nimis offenderentur contraire præcavens." Eadmer, 64. In the case of Becket, the king says: "Cito facite mihi judicium de illo," and clearly indicates the kind of judgment which he wishes, Hoveden I. 228, and Fitzstephen says: "Rex exegit judicium," *Materials,* III. 52, and *cf. Ibid.* IV. 42. An interesting instance of the king's asking the advice and judgment of the curia, not in a suit at law, is to be found in the *Chron. Mon. de Bello,* 164-165. On the abbot of Battle's asking that a charter decayed by age be renewed, the king said: "Non hoc, inquit rex, nisi ex judicio curiæ meæ facturus sum." Later "rege super hoc, si faciendum esset necne, judicium procerum requirente, decet, inquit Ricardus de Luci, decet vos si placet domine cartam ecclesiæ de Bello renovare." Evidence that this conforms to the general practice is hardly necessary. Says Beaumanoir, Chap. lxvii (ed. Salmon) c. 1883,.. "la coustume de Beauvoisins est tele que li seigneur ne jugent pas en leur court, mais leur homme jugent."

[22]The writer says it is the laymen who call out but, as the decision was perfectly just, it is likely that some of the bishops besides Lanfranc joined in it.

[23]Similar confusion in the court is not infrequently recorded. In the bishop of Bath's court, Madox, I. 111, after the evidence was presented and when the court should proceed to judgment some tumult arose, "aliis bona laudantibus, aliis ex adverso tumultuantibus." In the case narrated in the *Chron. Mon. de Bello,* 87-104, the laughter of all at the humor of the king is related, and twice the murmurs of the assembly against the bishop Similar disorder is also very evident in the trials of Anselm and Becket.

themselves to the bishop's safe conduct, spoke up and said, that they had brought him there to do justice to the king. "I am ready" cried the bishop "if it is canonically judged that I ought to respond despoiled, for I will not in this trial transgress the law of my order."[24] Then Roger Bygod[25] turned to the king. "You ought," he said, "to say to the bishop of what you wish to appeal him,[26] and if he answers cause him to be judged upon his answer, and if he does not answer take counsel with your barons as to what should be done."[27] Things were thus drifting rapidly against the bishop's contention and he again emphatically repeated his refusal of lay jurisdiction, but Hugh de Beaumont for the king, *ex præcepto regis,* rising, made formal accusation stating fully and specifically the

[24]In raising this technical point, the *exceptio spolii,* which he very possibly derived from the Pseudo-Isidore, see Pollock and Maitland, *H. E. L.* I. 117, the bishop was trying again to confuse the issue. There was no question of his bishopric before the court, nor directly of his fief but, as Hugh de Beaumont makes clear in his detailed statement, the question was whether he had not been unfaithful to his sworn feudal duty. The taking in hand of his fief in advance of the decision of this question was a very different thing from the sort of disseissin which the courts would recognize as giving a right to this exception. *Cf.* Bracton's *N. B.,* pl 1113; 1136; M. Par. VI. 74. In the present case the bishop was called upon to answer before the court in regard to nothing of which he had been despoiled.

[25]Father of Hugh, first Earl of Norfolk, who had taken part in the revolt, but, admitted to the king's favor, he appears in the court as one of its members in the trial of his fellow rebel. Freeman, *William Rufus* I. 36, 98.

[26]The word "appeal" is of course a technical word, indicating that a criminal charge was made against the accused by an individual acting in his private capacity. How far we are warranted in regarding it as technical here, is doubtful. The writer is plainly not careful to use technical language. But see *rex te appellat* in the formal opening which follows and other cases of the use of the word. The case certainly is an appeal whether the writer was conscious of the technical meaning of the term or not.

[27]This should be the regular and formal opening of the case. That it had been so long deferred, that so much discussion had preceded it, shows how unusual had been the line of action followed by the accused, and also that with the deliberative character of the court such action was entirely possible. A formal opening seems to have been the regular rule, followed by an equally formal reply by the defendant, but there is no trace of any fore-oath, nor of an oath of any kind from the parties. The openings are speeches. In the *Chron. Mon. de Bello,* 88, the abbot's case is opened by Richard de Luci; in the case on page 107 two representatives of the abbot speak, *ex ordine exposuerunt;* in the bishop of Bath's court the prior opens the case. The opening should regularly be followed by a speech from the other side arguing against the case presented, or by a statement of the opposing case. In the first Battle Abbey case cited above, the chancellor called on the bishop to reply; in the case on page 107, the defendant calls attention to the lack of a seal on the charter submitted by the other side, "ne nihil objicere videretur."

king's case.[28] Again the bishop refused to plead except under the conditions he had stated.[29]

On this a tumult broke out in the assembly, some calling out arguments and others insults, says the writer. In the midst of the confusion apparently, the bishop of Coutances suggested to Lanfranc that the bishops and abbots should retire and with some of the barons and earls should decide whether the bishop's demand that he be reinvested before pleading should be granted or not.[30]

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[28]The narrative of this trial is so circumstantial that if the king had personally taken an active part in conducting it, the fact would surely have been noted. The *ex praecepto regis*, which introduces Hugh de Beaumont's action, raises the question whether the king was not always represented by some member of the court when he was a party to a suit before it. This seems altogether likely, but the evidence does not permit a positive assertion. The somewhat greater share which William II. takes in the trial of Anselm at Rockingham, in a closely parallel case, is clearly that of a party deeply interested in the outcome and seems to be noted as exceptional. Nearly all the cases cited in these notes from the reign of Henry II. show that king taking a hand freely in the immediate conduct and direction of proceedings of all kinds, but the fact may be due to his personal character. In political sessions of the curia, it was not infrequent that someone spoke for the king. See M. Par. III. 380; IV. 185, 187. In 1244 that the king speaks *ore proprio* is noted as if it were unusual. *Ibid.* IV. 362. But later (p. 365), others speak for him, and yet he suddenly appears in person, "rex solus festinanter et ex abrupto advenit."

[29]"Episcopus autem Hugoni respondit: Hugo, dicas quicquid volueris, non tibi tamen hodie respondebo, nec accusationem aliquam recipiam, vel placitum aliquod ingrediar usque quo juste judicetur quod dispoliatus debeam placitare, vel canonice de episcopatu meo investiar; et postea de quibuscunque rex me appellaverit voluntarie respondebo." (p. 181). The form of the bishop's answer shows how informal were the proceedings at this point.

[30]The proposition of the bishop of Coutances that the point in dispute be decided by a committee of the court was in accordance with a very frequent practice of the feudal courts. They often committed their function of making a judgment to a selected body of their own membership though, as may be seen in the judgments made in the present case, such a proceeding was entirely optional. Instances will be found in Round, *Calendar* Nos. 712, 1190, 1212, 1257, this last in a private court. There the committee is said to be *electi*, but it is not said by whom. So also in the *Usatici Barchinone*, c. 80: "Judicium in curia datum, vel datum a judice de curia electo, ab omnibus sit acceptum et omni tempore secutum." In the trial of Thomas Becket, in the first judgment against the archbishop, *Materials*, IV. 42, the committee was appointed by the king, "Egrediuntur mox ad judicium quos rex ipse judices ex nomine dessignabat." In the court of the bishop of Bath, Madox I. 111, the judgment is made by a committee *secedentes a turba*. On one occasion William I. seems to have submitted a case between two monasteries to a committee of bishops and abbots alone who withdrew into a chamber and made a judgment which the king confirmed. Round *Calendar*, No. 1114. See Liebermann, *Gesetze*, II. 701, Article Urteilfinder. A confirmation by the court seems regularly to follow the committee decision. See M. Paris, IV. 362. Some of the cases of consultation apart by members in political meetings of the curia, to which reference is made in note 37, may be cases of action by committees. On the possible derivation of the committee's

"It is not necessary that we should go out," said Lanfranc, "let the bishop and his men go out, and we clerics and laics will judge equitably what we ought justly to do."[31] To this bishop William agreed,[32] but in going he admonished the bishops to do nothing contrary to the canons. "Go on," said Lanfranc, "for we shall do justly whatever we do," and Hugh de Beaumont cried out to the bishop, "If I am not able to judge you and your order today, never shall you and your order judge me further;"[33] and the bishop in reply again refused to accept any except canonical judges.[34]

It is very evident that the bishop's refusal to accept the jurisdiction of the court, and the grounds upon which he based his refusal, were unexpected, and that the assembly was greatly troubled in consequence.[35] The bishop had taken his position with great

system of the later Parliament from this practice, see Holdsworth, as cited in note 1, p. 16. An illustration in the transitional period, in the Parliament of 1305, may be seen in Maitland *Memoranda de Parliamento*, No. 454, and *cf.* Maitland's comment at page xliv.

[31]From such evidence as we have it is not possible to say that the accused was required to go out of the court while the judgment was being made, but I am inclined to think that he was.

[32]"Ego, inquit episcopus, libenter egrediar." The bishop's attitude in general towards the court makes it impossible to consider that his *libenter* means that he had really any choice in the matter.

[33]A clear enough statement of the position of the bishops in the curia regis on the same footing as the other barons. In Becket's case the bishops say: "Non sedemus hic episcopi, sed barones. Nos barones et vos barones pares hic sumus." *Materials*, III. 52. See Constitutions of Clarendon, c. xi.

[34]The conclusion to which the air and tone of this whole account conduce, that it was written by an eye witness, is strengthened by the fact that no attempt is made to tell what went on in the court while the bishop and his men were out. It seems also to be based on contemporary memoranda, though it may not have been put into the form in which we have it until later. See Symeon of Durham I. xxv.

[35]H. Boehmer, *Kirche u. Staat in England u. in der Normandie* (1889) 174, says that the bishop did not understand the distinction which Lanfranc makes between his bishopric and his fief. This opinion will not stand the test of a careful reading of the bishop's case. It is quite evident from the skill with which he chose his line of defense that he had the point clearly in mind from the start and knew that if he allowed a feudal trial on feudal grounds his case was hopeless. *Cf.* notes 20 and 40. Boehmer remarks (p. 173) that the position which the bishop takes is in agreement with the principles of the Pseudo-Isidore, and this has been also noticed by Pollock and Maitland, *H. E. L.* I. 117. Freeman, *William Rufus*, I. 104, n. 1, says that he seems to have had a copy of the False Decretals with him. In the trial of Anselm at Rockingham in 1095 he reversed his position. He "was the man who above all others maintained the royal jurisdiction over the bishops." Article *Carilef, Dict. Nat. Biography.* Eadmer 59-62. The same position as the bishop of Durham was taken by bishops in France. See Luchaire, *Manuel des Inst. Francaises*, 559, n. 1, and Vernon Harcourt, *Steward*, 272.

skill, probably for the first time in English history, and he had fortified himself with a book of "Christian law"—*quam hic scriptam habeo*—possibly a copy of the Pseudo-Isidore, as has been suggested. Lanfranc, however, met him at every turn. If the point, as pushed home so vigorously, was new in practice, it was logically so clearly involved in earlier cases, as well as in the general claims which the church was making that the lawyer archbishop of Canterbury had no difficulty in seeing to what conclusions it led, and in providing for them.

The writer says that it was only after long delay that the bishop and his company were called back to the assembly. The judgment which the court had reached was made known to him by the archbishop of York. He said that the archbishop and the curia regis had judged that he must do right to the king before he was reinvested with his fief.[36] Instantly the bishop pitched upon this phrase: it was that he might be judged concerning his bishopric that he had gone out. No one had said a word to him before about his fief, nor he to anyone. The judgment means, explained the archbishop, that the bishop is not to be reinvested with anything before he has done justice to the king. The bishop then demanded that the judgment be proved to him to be canonical and just, and Lanfranc said in effect that the judgment was just, and that the bishop knew it and ought to accept it, or make formal answer, *contradicere*. Bishop William then asked to be allowed to take counsel with certain of the bishops and was told by Lanfranc that the bishops were his judges and could not be his counsellors.[37] William appealed directly to the king on the point and was told to consult with his own men, for he could have no aid from the king's, and he went out to advise with them.[38]

[36]The use of the term curia regis in announcing the two formal judgments which were made by the court, should be noticed. The notion that this term was in any way especially connected with the small curia, A. M. Chambers, *Const. Hist. of England*, 97, or with any institutional change in the reign of Henry I. has no support in the sources. The croniclers use it not infrequently of William I.'s time. Orderic Vitalis II., 263, 264; *Chron. Mon. de Bello*, 26.

[37]As the accused was an ecclesiastic, this was not a case which could be expected to involve regularly a blood judgment, and therefore it does not come under the exception allowed in the court service of prelates in c. xi of the Constitution of Clarendon.

[38]The right of the accused, or of a party to the case before the court, to go apart and consult with his friends was clearly recognized and of frequent exercise. In 1102 Robert of Bellême took advantage of the custom to escape trial. "Cumque Rodbertus licentiam, ut moris est, eundi ad consilium cum suis postulasset, eademque accepta, egressus purgari se de objectis criminibus non posse agnovisset, equis celeriter ascensis, ad

On his return bishop William in a rather long speech formally refused to accept the judgment which the court had just made for the reason which he had already stated, that he could not be canonically judged by a lay tribunal, and closed with a formal appeal to the pope, the final act for which he had no doubt been preparing from the beginning. To this speech Lanfranc replied that he was not judging him as a bishop but concerning his fief, as the bishop of Bayeux had been judged before the king's father, "de feodo suo, nec rex vocabat eum episcopum in placito illo, sed fratrem et comitem."[39] After a brief dispute with Lanfranc on this point the bishop said that he did not understand the distinction[40] and

castella sua pavidus et anhelus confugit. Orderic Vitalis, IV. 170. In the bishop of Bath's court the prior spoke for the church, "habito cum fratribus consilio." Madox, I. 111. In the case in the *Chron. Mon. de Bello,* 108, the king in directing the abbot to go out to take counsel gives him a plain hint as to what he should decide upon. In the case, *Ibid.,* 97, Richard de Luci makes formal (*surgens*) request that the king will permit the abbot "consilium cum amicis suis secretius habere." In this case the counsellors are members of the court and the king goes out of the room while they consult. They seem almost like a committee of the court to form a judgment, but the long speech of the chancellor, Thomas, who is chosen as their mouthpiece, when the court resumes, is not a judgment but an argument for the bishop. The same practice in an ecclesiastical court may be seen, *Ibid.,* 175-176. The bishops advise both Anselm and Becket to submit to the king, but such counsel is quite different from that desired in the conduct of a case before the court. The bishops definitely refused counsel of that kind to Anselm. Eadmer, 56. The first right of the king to the counsel of his vassel who is at the same time the vassal of another is clearly implied in the statement about Nigel d'Oily, *Chron. Mon. Abingdon,* II. 133. Counsel of the sort asked for by the bishop is different from that of the professional or semi-professional advocate who developed in the course of the thirteenth century. Full provisions in regard to such counsel are given in the Assizes of Jerusalem, *Livre Jean d'Ibelin* cc. x *ff.* The siegneur might assign such duty to any member of his court but no one could plead against his lord or his man without the consent of the seigneur. *Ibid.* c. xxv. Other thirteenth century codes contain provisions regarding the advocate. The practice of consultation apart in political sessions of the curia regis may be seen in M. Par. III. 381; IV. 185-188, and 362. This seems to me at least a more probable explanation than that suggested by Ramsay, *Dawn of the Constitution,* 80, and to apply also to the other cases there referred to, *Foundations of England,* II. 194, and *Angevin Empire,* 46. Consultation by members of a local popular court in a matter political rather than judicial in character is recorded in *Bracton's Note Book,* pl. 1730.

[39]This passage suggests the possibility that this particular method of dodging the difficulty presented by the double position of the bishop may have been adopted in the earlier case at Lanfranc's suggestion. He certainly remembers clearly the exact point. According to Fitzstephen there was also some allusion to the case of Bishop Odo in the discussions attending the trial of Thomas Becket. *Materials,* III. 65.

[40]This looks like a deliberate falsehood on the part of the bishop. To one with as keen a mind as his, who had had so much to do with public affairs as he, the double position of the bishop in the feudal state must have been evident and the contradiction clear enough to suggest its advantage for him in his present straits. See notes 20 and 35.

asked to be allowed to go to Rome according to his appeal. This demand brought before the court another point upon which judgment must be passed, and the accused was again told to go out, "et rex, cum suis habito consilio, dicet tibi quid sibi placuerit." When the bishop returned, however, it was not the king but Hugh de Beaumont who made known to him the judgment of the court.[41] This had gone beyond a decision of the request which the bishop had made and was in effect a final decision of the case though not upon the merits of the original accusation. The bishop was informed that on account of his refusal to plead and of his appeal to Rome, the court (curia regis) had declared his fief to be forfeited.[42]

This is evidently the technical end of the case, but after some conversation between Hugh de Beaumont and the bishop, going over again some of the points earlier made, the king interfered for the second time, so far as is directly stated in the narrative, and demanded that since the bishop would not accept the judgment of his court, his castle should be surrendered before going to Rome. This demand the bishop resisted, attempting to fall back upon the safe conduct which certain barons had guaranteed him, and there was much conversation on the question, Lanfranc sustaining the king's demand,[43] and finding reason against the bishop's appeal to the safe conduct, but no formal action by the court is stated. The bishop finally yielded to the reiterated declaration of the king that he would not let him out of his hands until his castle was surrendered. Disputes then followed on some minor

[41]This may be the actual *Rechtsgebot,* the final and legalizing pronouncement of the judgment of the court, in which case Hugh de Beaumont was probably directed by the king to make it known. Or it may be the formal announcement by the court of the judgment it had reached, which would become final and binding when the king signified his assent. Such a formal statement by a single member of the court speaking for the rest, probably to make known the judgment to the lord, seems to have been not uncommon. *Cart. Mon. Glouc.* I. 14. See also the controversy between the barons and the bishops as to which shall pronounce the judgment of the court in one portion of the case against Thomas Becket. *Materials,* III. 52. On the *Rechtsgebot,* see my *Origin of the English Constitution,* 64, n. 7. For a good example of it in a case under Geoffrey in Normandy, see Delisle, *Actes de Henri II.,* Introd. 138, n. 1. It is from this that comes the absolute veto of the king on legislation of the later Parliament.

[42]Regarding the bishop as a baron, this is in every respect a correct judgment. It has its exact legal parallel in the case of Robert of Bellême. Orderic Vitalis, IV. 170, and in the judgment pronounced against King John in 1202 by Philip II's court declaring his French fiefs forfeited.

[43]And quite rightly. The bishop could find no possible ground on which justly to retain possession of his castle after he had forfeited his fief.

points, on all of which the bishop was forced to yield to the king.

The case of the bishop being finally finished, William de Merlao, a man of the bishop of Coutances, rose and addressing the king complained that some of the bishop of Durham's men had seized cattle belonging to his lord and that they had not been able to obtain compensation. He prayed the king to secure it for his lord. The king referred the request to the court. "Barons," he said, "see if I can justly implead the bishop,"[44] and Lanfranc answered that it could not justly be done, because the bishop no longer held anything of the king,[45] and was entitled to safe conduct. The account follows the bishop to Normandy, but contains nothing further for our purposes.

Two later curia regis trials of great ecclesiastics upon similar charges are fully reported and of special interest, the trial of Anselm in 1095 at Rockingham, and the trial of Thomas Becket at Northhampton in 1164. In both cases the charge seems to have been lese-majesty, against Anselm for recognizing Urban as pope without the permission of the king, and against Becket for refusing to obey a royal summons to court, at least this was the charge at the beginning of his case.

The account of the trial of Anselm which is given us by Eadmer[46] is that of an eye witness, but it is much less objective and impartial than the account which we have been following of the trial of the bishop of Durham, and it is so untechnical in character that it is not easy to use it for the present purpose. Some points, however, are sufficiently clear and have been referred to in the notes. Of the trial of Becket we have important accounts which supplement each other satisfactorily and give us many details.[47] One especially is by an eye witness who evidently had

[44]See n. 21. This is plain here again and also in the two formal judgments already pronounced by the court.

[45]Lanfranc's answer is defensible legally only on the narrowest ground of the strictly feudal jurisdiction of the curia regis, and this is probably what he meant, but it was undoubtedly politic and morally right. See n. 9.

[46]Eadmer, *Historia Novorum*, (Rolls Series) 53-67.

[47]In Robertson, *Materials for the History of Thomas Becket* (Rolls Series) in seven volumes, as specifically referred to in the preceding notes. The account of Fitzstephen in Vol. III. shows considerable legal knowledge. The description of the appeal of default of justice which is given in one of the accounts of the trial (the Anonymous Author, IV. 40-41) is so incorrect in some particulars that it creates at first a presumption against the legal accuracy of this account, but in the main the presumption is not justified. The legal details of the Anonymous Author are fairly accurate. Of the appeal, he twice says that it is a new constitution which of course it was not, as it was universal in the feudal world. It is probable, however, that Henry II. introduced by legislation some

some technical knowledge of the law. References have also been made in the notes to points of interest in this trial bearing upon specific questions of procedure.

Here I wish to indicate the general conclusion that at most, with two apparent exceptions, both of which are in reality doubtful exceptions to any rules of procedure, these two cases are, so far as we are able to decide upon their details, in full agreement with the other cases cited. The exceptions referred to are first, that in both cases the accused seem not to have been present regularly in the formal sessions of the curia, and second, that they seem to have had the counsel of the bishops, either as allowed them by the courts or as thrust upon them by the ecclesiastics themselves. In neither instance, however, do the prelates seem to have given counsel upon points involved in the actual trial, but upon the general conduct of the accused, and upon the carrying out of the sentence of the court. The same thing is to be said of all the cases, French and English, which I have read: while in most cases the record is brief, and clear details of procedure not frequent, when they do appear they are in harmony with those to be found in the more full accounts.

From the cases which I have been able to bring together in text and notes, it does not seem to me possible to say that any definite procedure, or order of procedure, was required in the great curia regis as formally necessary. We can only say that certain forms or rules were so common, or in the case of some of them perhaps, so universal that there is a presumption that they were formal and required, of the nature of fixed rules.

There should be a formal opening in which the case of the plaintiff or appellant is stated; to this the defendant, or the accused, should make a formal answer, *contradicere,* or formally abandon his case. In the trial there might be much set argument and explanation addressed to the court by the parties, or their representatives, apparently under no very formal regulations, and evidence oral or written might be produced,[48] and members of

new details in its operation, especially in the method of proving a default, and that the author is confusing these with the appeal itself. The description of the appeal which the Anonymous gives does not differ materially from the caricature of it which we might expect from an angry baron who felt himself injured by it. It may represent what Archbishop Thomas thought of it.

[48] As the case against the bishop of Durham never came to a trial upon the real issue, there was no opportunity for the introduction of evidence but it is clear from many of the cases cited in the notes that evidence both written and oral might be produced by either party and often in what seems a quite informal way. In the case in the bishop of Bath's court both oral and written evidence was introduced.

the court were free to interrupt by question or objection. Probably both parties, certainly the accused, or the defendant, had the right to retire from the court and take counsel with his own men, but he could not have such counsel from the members of the court; they were his judges. The court rendered judgment from time to time, as the suit went on, upon such questions as arose, probably in the absence of the accused, and might even turn a judgment upon a special point into a final judgment upon the case as a whole. We get no evidence of any formal process by which a judgment was reached, by vote or otherwise. The majority opinion of the court plainly made the judgment, but what the opinion of the majority was, seems to have been ascertained by free discussion and indicated often by the more or less disorderly outcries of the members of the court. When it was known, the party who had gone out was recalled and the decision formally announced to him, either by the moderator or by some member of the court designated for the purpose. The part taken by the king, or by the moderator of the court, in the ongoing of an ordinary case, and the amount of indirect influence which he might have on the making of the final decision are left somewhat in doubt. It seems reasonably clear that when the king was a party in the case he took no part, or almost no part in the proceedings.

When we have, however, taken everything into account which seems to be at all formal, it must still be said that in judicial proceedings before the great curia regis there was much informality and much of the freedom of discussion of a deliberative body. This is only what we should naturally expect at a time when no sharp line was drawn, either in action or in theory, between the legislative and judicial functions of the curia.

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